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# AN ACE UP THEIR SLEEVE OR A HOUSE OF CARDS: CAN THE EPA'S AFFORDABLE CLEAN ENERGY RULE WITHSTAND CHEVRON DEFERENCE?

By Shannon Zaret\*

The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) is poised to become a prime battleground in a fight over the scope of the Environmental Protection Agency's (EPA) authority to regulate greenhouse gas emissions (GHGs) from the power sector under the Clean Air Act (CAA). The dispute stems from the EPA's recent efforts to replace the Obama-era Clean Power Plan (CPP) with the Affordable Clean Energy Rule (ACE Rule).<sup>1</sup> This move was quickly challenged by a coalition of twenty-nine cities and states as well as several prominent American health associations.<sup>2</sup> The two rules reflect very different views in regards to the role the federal government should play in combatting climate change, yet the core legal questions they pose are quite similar. To address pending litigation directed towards the ACE Rule, the D.C. Circuit will likely engage in a two-step inquiry. First, the court must examine whether the regulation of power plants under Section 112 of the CAA precludes their regulation under Section 111(d).<sup>3</sup> If the court answers in the negative, they must then determine if the CAA sets limits on the EPA's statutory authority to regulate power plant GHG emissions. This Article will argue that the EPA's obligation under Section 112 does not displace their Section 111(d) authority and that the newly finalized ACE Rule represents a much narrower interpretation of Section 111(d) that is inconsistent with the congressional intent of the CAA.

## BACKGROUND

Untangling this knot requires a careful study of the CAA's history and its impact on EPA's regulatory authority under Section 111(d). As amended in 1990, the CAA included conflicting language in Section 111(d).<sup>4</sup> Due to an oversight, both the House and Senate passed versions that ended up in the final act.<sup>5</sup> The House version of the bill precluded the use of Section 111(d) to regulate pollutants "emitted from a source category ... regulated" by Section 112.<sup>6</sup> The Senate's version, on the other hand, barred the use of Section 111(d) to regulate air pollutants covered under 112.<sup>7</sup> In other words, the Senate version focused on barring the duplicative regulation of pollutants and did not preclude the regulation of the same source for different classes of pollutants.<sup>8</sup> Although the House version was eventually codified,<sup>9</sup> this discrepancy would spark major contention fifteen years later after the CPP was finalized on October 23, 2015.<sup>10</sup>

In *West Virginia v. EPA* opponents of the CPP argued that the administration impermissibly relied upon the Senate version of the amended CAA, rather than the codified House version.<sup>11</sup> They contend that the text of Section 111(d)(1) has only one

permissible interpretation and must be read as barring the regulation of any "source" regulated under Section 112, even if in regard to an entirely different class of pollutants.<sup>12</sup> To win on the merits, opponents would have to demonstrate that the text is unambiguous and that no other reading of Section 111(d)(1) could possibly be reasonable.<sup>13</sup> This is unlikely, as the EPA's authority to regulate GHGs from existing power plants under 111(d) rests on extensive judicial precedent and is consistent with a long history of CAA precedents from both party's administrations.<sup>14</sup> The argument also finds no support in the CAA's text, structure, or legislative history.<sup>15</sup>

## ANALYSIS

To this day, the issue has never been fully litigated.<sup>16</sup> It is unclear whether it will be raised in the pending ACE Rule litigation, but the court will likely address the greater ambiguity of Section 111(d) before tackling the current conflict. If it does, the court should examine the legislative history and statutory context which suggests that the EPA's authority to regulate GHGs under Section 111(d) does not stand in contention with their Section 112 authority.

The second critical question is whether the EPA's authority to regulate power plant GHG emissions stops at the fence line. The answer is contingent upon the definition of "best system for emissions reduction" (BSER).<sup>17</sup> Section 111 of the CAA directs the EPA to establish emission standards for air pollutants based on what is achievable under EPA's determination of BSER.<sup>18</sup> The Obama-era CPP interpreted BSER broadly and encouraged states to go beyond the power-plant fence-line to reduce GHG emissions.<sup>19</sup> The Trump administration contends that the CPP exceeded the EPA's CAA authority and that Section 111 should be interpreted to apply to emissions reductions that can be achieved only by mandating controls, "applicable," or capable of being implemented at, the individual power plant.<sup>20</sup> A federal court will often accept an agency's construction of an ambiguous statute they administer (i.e., Chevron deference).<sup>21</sup> If the court determines the statute unambiguously grants EPA the authority to determine BSER as it did in ACE, then future administrations will be tied to this narrower interpretation of Section 111(d). Alternatively, if the courts find that the statute is ambiguous, they must then examine whether the ACE Rule is a reasonable interpretation or whether, under the standard of review, is arbitrary and capricious.<sup>22</sup>

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The ACE Rule contains inherent flaws, suggesting the EPA has not identified the BSER for the power sector but rather just a system of emissions reduction. For example, the EPA excludes many emissions reducing technologies and restricts the definition of BSER to on-site, heat-rate efficiency improvements (HRI).<sup>23</sup> This approach paradoxically prevents greater reductions inside the fence and would actually raise emissions at some plants.<sup>24</sup> Data from the EPA's own Regulatory Impact Analysis (RIA) projected that emissions under ACE would increase at eighteen-percent of coal plants.<sup>25</sup>

Further, the rule allows states to decide how significantly to cut emissions, if at all, rather than providing numeric targets for them.<sup>26</sup> This would enable states to set weaker standards and prevents the EPA from measuring state progress towards an established goal. Lastly, EPA's RIA indicates that replacing the CPP with ACE will result in an increase in sulfur dioxide and nitrogen oxide emissions and an additional 470-1,400 premature deaths compared to the CPP baseline.<sup>27</sup> The RIA also concluded that the ACE rule would result in billions of dollars of net

"foregone benefits" and projected that GHG emissions would be 3% higher in 2030 under every scenario analyzed.<sup>28</sup>

## CONCLUSION

Cumulatively, these issues restrict ACE from achieving maximum emission reductions both when compared to the more flexible CPP and even within their rigid inside the fence interpretation. This suggests that the EPA has not identified the BSER in the power sector and that there is room for the rule to be substantially broader. Whether the rule is arbitrary is something that the courts will ultimately resolve. However, courts should carefully evaluate these inconsistencies to determine whether ACE really represents the upper level of the EPA's authority to regulate GHGs or simply the bare minimum. If courts go with the latter option, they must reconcile how this could be a permissible interpretation of "best systems" or a sufficient regulatory response given that the legislative intent of the CAA is to achieve targeted air quality standards to protect public health nationwide.

## ENDNOTES

<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,661, 64,663 (October 23, 2015) [hereinafter CPP]; Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019). [hereinafter ACE Rule] (to be codified at 40 C.F.R. pt. 60).

<sup>2</sup> Petition for Review at 1-2, *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir. July 8, 2019).

<sup>3</sup> Section 112 of the Clean Air Act governs the federal control program for hazardous air pollutants for major sources. Section 111 establishes mechanisms for controlling emissions of air pollutants from stationary sources. Under Section 111(b) the EPA identifies the "best system of emission reduction" (BSER) that has been adequately demonstrated to control emissions from a particular type of pollutant from a particular type of source, and EPA sets performance standards based on the application of BSER. Clean Air Act, 42 U.S.C. §§ 7411-12 (2012). The ACE Rule is being proposed under Section 111(d), which addresses emissions from existing sources. It sets a framework for states to develop performance plans for existing sources based on BSER but allows the states to set their own performance goals. ACE Rule, *supra* note 1, at 32,520.

<sup>4</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) [hereinafter 1990 CAA].

<sup>5</sup> *Id.* at 2467, 2574.

<sup>6</sup> *Id.* § 108(g) at 2465.

<sup>7</sup> *Id.* § 302(a) at 2574.

<sup>8</sup> *Id.*

<sup>9</sup> Clean Air Act, 42 U.S.C. §§ 7411-12 (2012). Attempting to reconcile § 108(g) and § 302(a) as written proved challenging. Both provisions called for a strikethrough of "112(b)(1)(A)". Section 108(g) called for 112(b)(1)(A) to be replaced by "or emitted from a source category which is regulated under Section 112" while § 302(a) called for 112(b)(1)(A) to be replaced by "in lieu thereof 112(b)." Attempting to effectuate both would have resulted in a completely unintelligible sentence. Ultimately the sentence was made operative by adhering to the language of the amendment that came first, § 108(g).

<sup>10</sup> *West Virginia v. EPA*, No. 15-01363, 2019 U.S. App. LEXIS 29593 (D.C. Cir. Sep. 17, 2019) (dismissal of a consolidated proceeding against the EPA).

<sup>11</sup> Reply Brief of Petitioners on Core Legal Issues at 32-36, *West Virginia v. EPA* No. 15-1363, (D.C. Cir. Apr. 15, 2016).

<sup>12</sup> *Id.* at 32. Since the EPA regulated emissions of hazardous pollutants from power plants in the 2012 MATS Rule, the argument follows that they cannot set forth a Section 111 rule (i.e., the CPP) addressing power plant GHG emissions. *id.*

<sup>13</sup> See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984) (explaining that if the text of a regulatory enabling-statute is ambiguous and can be read multiple ways than courts should allow for reasonable Agency interpretation).

<sup>14</sup> See *American Electric Power Company, Inc. v. Connecticut* 564 U.S. 410, 411 (2011) (holding that Section 111(d) "speaks directly" to addressing the issue of carbon emissions from existing power plants). See also *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014) (upholding the Cross-State Air Pollution Rule as a "permissible, workable and equitable" interpretation of the Clean Air Act and upholding a regional emission credits trading program).

<sup>15</sup> See 42 U.S.C. § 7412(d)(7). When Congress first enacted Section 111(d) in 1970, it made clear that this section plays a critical "gap-filling" role for greenhouse gases that are not subject to national ambient air quality standards (Sections 108–110) or hazardous air pollutant standards (Section 112). Gregory E. Wannier, Et Al., Inst. For Policy Integrity, Discussion Paper No. 2011/2, *Prevailing Academic View On Compliance Flexibility Under § 111 Of The Clean Air Act* (2011), [https://policyintegrity.org/files/publications/Prevailing\\_Academic\\_View\\_on\\_Compliance\\_Flexibility.pdf](https://policyintegrity.org/files/publications/Prevailing_Academic_View_on_Compliance_Flexibility.pdf). The 1990 amendment did not abandon this framework as Section 112(d)(7) expressly provides that no standard under Section 112 "shall be interpreted, construed or applied to diminish or replace the requirements . . . established pursuant to Section 7411 of this title." 42 U.S.C. § 7412(d)(7). In fact, there is no mention in the legislative history that Congress intended to alter Section 111 to such dramatic affect. Brief for Respondent at 28-40, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. Jan. 23, 2015). The text of Section 111(d)(1) is ripe with ambiguities. The EPA laid out a number of different equally reasonable interpretations of the text in their response brief in *West Virginia v. EPA*. For example, the word "regulated" and the what that is being regulated is ambiguous here. The Supreme Court has directed the EPA to assign a "reasonable, context-appropriate meaning" to what is being regulated when the text of a statute is ambiguous. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2440 (2014). Thus EPA could reasonably conclude given the context and purpose of the CAA that what is being regulated was in fact the pollutant and not the source category. See *id.*; see also *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding that the U.S. Code is considered dispositive only for those provisions enacted

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